No. 80-1740

JUN 1 1981

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

T. BERTRAM LANCE, APPELLANT,

v.

FEDERAL ELECTION COMMISSION, APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO DISMISS

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JUNE 1, 1981

QUESTIONS PRESENTED

(1) Whether the court of appeals properly concluded that a constitutional challenge to 2 U.S.C. § 441b raised as a defense in a Federal Election Commission action to enforce an administrative subpoena did not require the extraordinary procedure of 2 U.S.C. § 437h.

(2) Whether the court of appeals properly affirmed a district court order enforcing a subpoena issued by the Federal Election Commission in connection with its investigation of a possible violation of 2 U.S.C. § 441b as it prohibits national banks from making loans in connection with elections outside the ordinary course of business.*

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* The only parties to this action are as stated in the caption. Common Cause filed a brief as *amicus curiae* before the *en banc* court of appeals.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO DISMISS

The Federal Election Commission hereby requests that this Court dismiss the appeal or, construing the jurisdictional statement as a petition for certiorari, deny the petition for the reasons set forth below.[1]

JURISDICTION

On January 19, 1981, the court of appeals *en banc* rendered a decision affirming the order of the United States District Court for the Northern District of Georgia, enforcing a subpoena issued by the Federal Election Commission ("FEC" or "Commission") for the testimony of T. Bertram Lance. The court

[1] In the alternative, should this Court conclude that it has appellate jurisdiction, the Court should affirm the judgment of the United States Court of Appeals for the Fifth Circuit as correctly decided.

grounded its decision to hear the matter *en banc* in its discretionary power under Rule 35, Fed. R. App. P. This Court does not, therefore, have appellate jurisdiction over this matter pursuant to 2 U.S.C. § 437h(b), but, rather, may deem appellant's jurisdictional statement as a petition for a writ of certiorari and may exercise jurisdiction to review the decision of the court of appeals pursuant to 28 U.S.C. §§ 2101(c) and 2106.

STATUTES INVOLVED

2 U.S.C. § 437g(a)(2)[2] provides that:

> If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. *The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section* (emphasis added).

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[2] The Commission's enforcement procedures were modified by the 1979 Amendments to the Federal Election Campaign Act, Pub. L. No. 96-187, 93 Stat. 1339 (1980). Citations are to the new procedures which became applicable to all cases in process as of January 8, 1980. Under former 2 U.S.C. § 437g(a)(2), the Commission was also commanded to investigate upon a finding of reason to believe.

2 U.S.C. § 437d provides in pertinent part that the Commission has the power:

> (a)(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties . . . .
>
> (b) *Judicial orders for compliance with subpoenas and orders of Commission; contempt of court.* Upon petition by the Commission, any United States district court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpoena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance. Any failure to obey the order of the court may be punished by the court as a contempt thereof . . . .
>
> (e) *Exclusive civil remedy for enforcement.* Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

2 U.S.C. § 437h provides that:

> (a) *Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.* The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of

this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) *Appeal to Supreme Court; time for appeal.* Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) *Advancement on appellate docket and expedited disposition of certified questions.* It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

2 U.S.C. § 441b is set forth in the jurisdictional statement ("J.S.") at 2-4.

STATEMENT OF THE CASE

The Federal Election Commission is the agency of the Federal Government charged with the administration and enforcement of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), 2 U.S.C. § 431 *et seq.* The Commission is mandated to investigate possible violations of the Act and has exclusive jurisdiction over civil enforcement of FECA.[3] 2 U.S.C. § 437c(b)(1); 2 U.S.C.

[3] The Commission is the only agency charged with civil enforcement of FECA. 2 U.S.C. § 437d(e). Thus, contrary to appellant's intimation, its investigation is not duplicative of those conducted by the Securities and Exchange Commission and the Comptroller of the Currency.

§ 437d(e). This subpoena enforcement action to obtain the testimony of T. Bertram Lance began on September 13, 1977 when the Commission found reason to believe that violations of 2 U.S.C. § 441b (formerly 18 U.S.C. § 610)[4] had been committed by the 1974 Bert Lance for Governor Campaign Committee and the Calhoun First National Bank. 2 U.S.C. § 437g(a)(2). On November 10, 1977, the Commission found reason to believe that violations of 2 U.S.C. § 441b had also been committed by the National City Bank of Rome, Georgia. Subsequent findings have been made as to two additional banks.[5] The alleged violations under investigation relate to various extensions of credit by national banks prior to, during and after Mr. Lance's 1974 gubernatorial campaign. The extensions of credit included overdrafts in 1974, repaid in 1975, loans made during the 1974 campaign, other extensions of credit made during 1974, and repaid in 1975, and loans made between 1975 and 1977 for the purpose of repaying outstanding campaign debts.

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[4] Section 441b of Title 2 prohibits national banks from making contributions or expenditures in connection with any election. This prohibition has been in effect since the Tillman Act of 1907, 34 Stat. 864; it was incorporated into the Corrupt Practices Act of 1925, 43 Stat. 1070, and then into the FECA of 1971, 86 Stat. 3, at 18 U.S.C. § 610. In 1976, the provisions of Title 18 were incorporated into Title 2 and § 610 became 2 U.S.C. § 441b. Pub. L. No. 94-283, § 321, 90 Stat. 475, 490 (1976). As appellant has noted, J.S. at 10, no substantive change has been made in the core prohibition of section 441b against contributions by national banks to candidates since 1907.

[5] During the course of this protracted litigation, the Commission's investigation has had to remain open, requiring that the national banks involved continue to operate with the possibility of a civil enforcement action in the future.

The Commission obtained information in the course of its investigation from other government agencies, through the use of subpoenas for the production of documents issued to various banks and individuals, and through the testimony of other individuals. On November 10, 1977, the Commission concluded that in order for it to resolve the issues raised in this matter, the testimony of Mr. Lance would be required. Accordingly, pursuant to 2 U.S.C. § 437d(a)(3), the Commission issued a subpoena requiring the presence of Mr. Lance for deposition on December 2, 1977. On November 22, 1977, Mr. Lance filed a motion to quash with the Commission which was denied on November 29, 1977. Mr. Lance failed to appear for the deposition as rescheduled, and on December 9, 1977, the Commission filed a petition to enforce the subpoena. The United States District Court for the Northern District of Georgia entered an order on February 10, 1978, requiring appellant to appear for a deposition. On April 26, 1978, the court of appeals stayed the district court's order pending appeal and on November 1, 1978, granted the Commission's motion to expedite the appeal.

In a post-argument brief filed in March, 1979, appellant referenced this Court's decision in *First National Bank of Boston* v. *Bellotti (Bellotti)*, 435 U.S. 765 (1978), nearly one year after issuance by this Court, and asserted that that decision cast doubt on the constitutionality of the provision underlying the Commission's investigation. After requesting supplemental briefing on the constitutional issue, on May 5, 1980, the panel of the court of appeals issued an opinion affirming the district court's rejection of Mr. Lance's arguments raised in the court below. However, the panel construed 2 U.S.C. § 437h as requiring that his constitutional claim be heard by the

en banc court. After additional briefing and argument, the *en banc* court affirmed the panel decision and determined that 2 U.S.C. § 441b is facially constitutional insofar as it prohibits national banks from making loans outside the ordinary course of business.[6] This decision, rendered on January 15, 1981, was heard *en banc* under Rule 35, Fed. R. App. P., not pursuant to 2 U.S.C. § 437h. J.S. App. at 36a. The Court specifically noted that § 437h raises difficult issues which it did not need to address, since a decision to hear the case pursuant to Rule 35 was a proper exercise of ordinary appellate procedure. Both the court of appeals and this Court denied Mr. Lance's motion for a stay pending appeal. Appellant appeared for deposition on March 31, 1981, nearly three and one half years after the Commission issued the subpoena.

ARGUMENT

This Court should dismiss the appeal taken by Mr. Lance or, construing the jurisdictional statement as a petition for certiorari, deny the petition, because this case does not present a question sufficiently important to warrant review by this Court.[7] In the

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[6] Appellant seems to be suggesting that the Fifth Circuit did not rule on his constitutional claim. J.S. at 7. On the contrary, the court explicitly found the relevant provision facially constitutional, J.S. App. at 47a-48a, and properly declined to permit Mr. Lance to challenge portions of § 441b not at issue in the Commission's investigation. J.S. App. at 43a.

[7] The court of appeals, citing the Ninth Circuit's opinion in *California Medical Association* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 (9th Cir. May 23, 1980) (en banc), *possible juris. postponed* No. 79-1952 (October 6, 1980), presently pending before this

alternative, this Court should affirm the judgment of the United States Court of Appeals for the Fifth Circuit as correctly decided.

1. This case does not present a substantial question warranting review by this Court. This is a subpoena enforcement action. This Court has held on numerous occasions that such actions are summary in nature, with review limited to whether the information sought is within the scope of a lawful investigation. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943). The court of appeals properly affirmed the district court decision that the Commission has jurisdiction to conduct the investigation in question.[8]

Court, noted the difficult issues posed by § 437h and concluded:

> Therefore, as the Ninth Circuit has done, we shall let our decision to hear the case en banc rest on our discretionary power under Fed. R. App. P. 35.

J.S. App. at 36a. The court did not reach the questions of appellant's standing to bring a § 437h case as a voter, the appropriateness of the case to decide the constitutional question, or the difficult issues posed by the requirement that these cases be heard by the court *en banc*. There is, therefore, no question that this case is anything other than a subpoena enforcement action properly reviewable by this Court only upon issuance of a writ of certiorari.

[8] A recent decision of the United States Court of Appeals for the District of Columbia Circuit, *Federal Election Commission* v. *Machinists Non-Partisan Political League*, No. 80-1136 (D.C. Cir. May 19, 1981), overturned a district court order enforcing a Commission subpoena, establishing a higher standard for enforcement of Commission subpoenas. How-

While the Commission disagrees that the court of appeals needed to reach the question of the constitutionality of the underlying statutory prohibition until such time as the Commission might ultimately bring a civil action to enforce the statute,[9] the court's deci-

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ever, even had this stricter standard been applied, the Fifth Circuit properly found that the Commission has jurisdiction to investigate potential violations of 2 U.S.C. § 441b and ordered compliance with the Commission's subpoena.

[9] Despite the fact that this Court has been hesitant to rule on the constitutionality of § 441b in the absence of a complete factual record, *Pipefitters Local No. 562* v. *United States*, 407 U.S. 385, 402 (1972) (*"Pipefitters"*); *United States* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (*"UAW"*), 352 U.S. 567, 593 (1957); *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948) (*"CIO"*), the court of appeals, in the absence of any record, reached the constitutional question. The court's decision is, thus, contrary to this Court's principle of avoiding "premature interruption of the administrative process." *McKart* v. *United States*, 395 U.S. 185, 193 (1969). This doctrine is applied to administrative proceedings even though an agency "will not ordinarily pass on the constitutionality of the statute under which it operates," *Rosenthal & Co.* v. *Bagley*, 581 F.2d 1258, 1260 (7th Cir. 1978), *citing Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 539 (1958), because of the "desirability of deciding constitutional questions in a factual context," *Squillacote* v. *International Brotherhood of Teamsters*, 561 F.2d 31, 38 (7th Cir. 1977).

Further, unlike other cases properly heard pursuant to § 437h, there was no factual record developed in the district court and there were no precisely framed questions certified to the court of appeals. This Court has underscored the importance of a detailed and complete record for reviewing the very statutory provision at issue herein, *UAW*, 352 U.S. at 590 (1957), as have other courts. *Martin Tractor* v. *Federal Election Commission (Martin Tractor)*, 627 F.2d 375, 380 (D.C. Cir. 1980). Every prior § 437h case has entailed fact

sion to order compliance with the Commission's subpoena is, nevertheless, consistent with prior decisions of this Court and thus does not present any question warranting further review.

2. Contrary to appellant's statements, the court of appeals explicitly ruled on appellant's constitutional claim, properly concluding that the statutory provision at issue is not facially unconstitutional. This Court has several times reviewed cases challenging

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finding—sometimes amounting to records of thousands of pages—and precise articulation of the specific constitutional questions posed. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Republican National Committee* v. *Federal Election Commission*, 461 F. Supp. (S.D.N.Y. 1978), 487 F. Supp. 280 (S.D.N.Y. 1980) (three-judge court), 616 F.2d 1 (2d Cir. 1980) (en banc) *aff'd mem.*, 445 U.S. 950 (1980); *Bread Political Action Committee* v. *Federal Election Commission*, 635 F.2d 621 (7th Cir. 1980) (en banc), *appeal docketed* No. 80-1481 (March, 1981). Despite the apparent command of section 437h, other courts have refused to rule on constitutional questions raised in § 437h cases, where a decision on constitutional grounds could be avoided, *Federal Election Commission* v. *CLITRIM*, 616 F.2d 45, 51-52 (2d Cir. 1980) (en banc), or where the question was prematurely raised. *Martin Tractor*, 627 F.2d at 383; *Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977).

There is a substantial question as to whether Mr. Lance would have had standing to bring this case under § 437h. It is quite clear from his jurisdictional statement that he is not asserting any interests as a voter. *Clark* v. *Valeo*, 559 F.2d at 647; *Republican National Committee* v. *Federal Election Commission*, 461 F. Supp. at 577; *Martin Tractor*, 460 F. Supp. 1017, 1019, (D.D.C. 1978), *aff'd on other grounds*, 627 F.2d 375 (D.C. Cir. 1980). Indeed, it seems that he is asserting some right to challenge section 441b as a class representative on behalf of the nearly 5,000 national banks. J.S. at 9.

the constitutionality of 18 U.S.C. § 610, 2 U.S.C. § 441b and has each time construed the statute so as to avoid an unnecessary constitutional ruling. *Pipefitters*, 407 U.S. at 402; *UAW*, 352 U.S. at 593; *CIO*, 335 U.S. at 124. Even more recently, in distinguishing FECA from the statute at issue in *Bellotti*, upon which petitioner relies, this Court specifically noted that:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts . . . . [citations omitted] The importance of the governmental interest in preventing this occurrence has never been doubted.

435 U.S. at 788 n.26. This governmental interest is more than sufficient to support the prohibition at issue in the Commission's investigation against national bank officers making loans to candidates outside the ordinary course of business.[10] As the court of appeals held, there is no question of independent expenditures here[11] or of any "public expression of support" on behalf of a candidate, J.S. App. at 47a;

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[10] This Court has noted that Congress has a special role with respect to national banks:

> "National banks are creatures of federal law and intrumentalities of the Federal Government, *Easton* v. *Iowa*, 188 U.S. 220, 229-30 (1903), *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) . . . ."

Bellotti, 435 U.S. at 778 n.14.

[11] This Court also noted in *Bellotti* that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." 435 U.S. at 787 n.26.

rather, these transactions ". . . were inherently private or secret." *Id.* Indeed, it is difficult to imagine a scenario more deserving of congressional interest than preventing a national bank officer from diverting bank funds for the benefit of his own campaign for public office. Where, as here, the Commission is investigating allegations of massive use of bank funds to finance an election campaign, there is every indication that prohibition of these potential violations is precisely of the nature found by this Court in *Buckley* and *Bellotti* to be supported by compelling governmental interests. *Bellotti*, 435 U.S. at 787 n.26; *Buckley*, 424 U.S. at 26-28 n.31. The court of appeals properly applied decisions of this Court in upholding the district court's order enforcing the Commission's subpoena and in concluding that 2 U.S.C. § 441b is facially constitutional insofar as it prohibits national banks from making loans outside the ordinary course of business.[12]

3. There is no conflict among the circuits as to the constitutionality of 2 U.S.C. § 441b. Numerous federal courts have held the provision constitutional *Bread Political Action Committee* v. *Federal Election*

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[12] Further, the court of appeals properly rejected appellant's overbreadth claim. Mr. Lance's conduct falls squarely within the core prohibition and thus, he is not entitled to bring a challenge concerning that activity which may be on the fringes of that prohibition. *Young* v. *American Mini Theatres*, 427 U.S. 50, 59-60 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). Moreover, the statute now contains a provision permitting any person to request an advisory opinion concerning the application of the statute to a specific transaction or activity in which he or she wishes to engage. 2 U.S.C. § 437f. *Martin Tractor*, 627 F.2d at 384-86 (availability of advisory opinions lessens need for challenges based upon alleged overbreadth of the statute).

Commission, 635 F.2d 261 (7th Cir. 1980) (en banc), *appeal docketed* No. 80-1481 (March 1981); *California Medical Association* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 (9th Cir. May 23, 1980) (en banc), *possible juris. postponed* No. 79-1952 (October 6, 1980); *United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973); *Pipefitters*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *Federal Election Commission* v. *National Right to Work Committee*, 501 F. Supp. 422 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association*, 239 F. 163 (W.D. Pa. 1916).

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission submits that this Court should dismiss the appeal or, construing the jurisdictional statement as a petition for certiorari, deny the petition. Alternatively, the Court should affirm the judgment as properly decided.

Respectfully submitted,

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